Nos. 14,503 and 14,504

IN THE

United States Court of Appeals

For the Ninth Circuit

JOW CHU YUN, on behalf of
Jow Mun Yow,
Appellant,

vs.

BRUCE G. BARBER, District Director,
Immigration and Naturalization
Service,
Appellee.

JOW CHU YUN, on behalf of
Jow Kwong Yeong,
Appellant,

vs.

BRUCE G. BARBER, District Director,
Immigration and Naturalization
Service,
Appellee.

APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

STATEMENT OF FACTS.

Prior to October 21, 1951, upon alleged claims of United States citizenship derived from an alleged

United States citizen father, Jow Mun Yow and Jow Kwong Yeong, each a Chinese person born in China, received from the American Consul at Hong Kong travel authorization to journey to a port of entry of the United States. In accordance therewith they each did travel to the port of San Francisco, California, where they claimed admission to the United States as citizens thereof. On or about October 21, 1951 they were paroled into the United States on bond. Thereafter, in accordance with the applicable laws and regulations of the Immigration and Naturalization Service a hearing was held before a Board of Special Inquiry. Upon the conclusion of said hearing an order excluding Jow Mun Yow and Jow Kwong Yeong was made. Appeals were taken to the Board of Immigration Appeals. The opinions and findings of the Board of Special Inquiry were affirmed, the appeals were dismissed and the order of deportation became final on August 14, 1953.

On March 23, 1954 Jow Chu Yun, in behalf of Jow Mun Yow and Jow Kwong Yeong, filed the petitions for writs of habeas corpus herein and prayed the Court to inquire into the legality and lawfulness of the restraint. On the allegation of paragraph V (Tr. p. 5) of the petition that the Board of Special Inquiry had excluded evidence from the hearing dealing with the blood and paternity tests, the Court below ordered the writ to issue to enable the two claimants to present to the Court the excluded medical evidence. (Tr. p. 17). At the hearing the petitioners introduced the Immigration file, Ex. I (Tr. p. 17) and by stipulation the medical report as Ex. II. (Tr. p. 18.)

JURISDICTION.

The review of the immigration proceeding by the Court below was pursuant to Sec. 360(c) of Public Law 414 (66 Stat. 163-273) of the 82nd Congress, 8 U.S.C. 1503(c).

Jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 2253.

QUESTIONS PRESENTED.

Appellant has filed a statement of points (Tr. p. 31) but in his brief has not attempted to frame the questions considered to be presented to the Court on this appeal. Appellee states the questions presented as follows:

(1) Does Sec. 360(c) of Public Law 414 (8 U.S.C. 1503(c)) require a review in habeas corpus proceedings different from the review made by the Court below?

(2) Did the Board of Special Inquiry or the Board of Immigration Appeals act in some unlawful or improper way or abuse their discretion?

STATUTE.

8 *U.S.C.* (Public Law 414, Sec. 360).

> Sec. 360. (a) If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the

ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is hereby conferred upon those courts.

(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular office that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial

of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

(c) A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings but not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States.

ARGUMENT.

(1) SEC. 360(c) OF PUBLIC LAW 414 HAS EXPRESSLY LIMITED REVIEW TO HABEAS CORPUS.

Appellant's first comment (Br. p. 4) is "We find ourselves in a legal dilemma", which appellee takes to mean a choice between equally unsatisfactory alternatives. The alternatives are not stated so neither the unsatisfactory nature nor the choice is evident. Two sentences later the following statement is made: "It is our considered view that we are entitled to the same type of review on habeas corpus that we would have been entitled to under Section 903 of the prior immigration law". No attempt is made to support this "considered view"—rather it is disposed of by the statement that Section 1503 of Title 8 USCA (Sec. 360 of Public Law 414) provides "that judicial review is not available in the case of an exclusion order", and that "we are dealing here, of course, with an exclusion order". (Br. p. 5.) After reference to *Florentine v. Landon,* 206 F.2d 870, appellant states, "We are concerned as to the nature of the review permitted under the McCarran Act in a habeas corpus proceeding of this nature". (Br. p. 5.) But "while this is an important legal question, we do not believe that it is of paramount importance in this matter." Appellant then goes on to say "it is our view that the proceedings before the Board of Special Inquiry of the Immigration and Naturalization Service were arbitrary and capricious and that the findings of fact are entirely contrary to the evidence." On page 7 of his brief *Quon Quon Poy v. Johnson,* 273 U.S. 352, is cited as authority. To this we add *United States v. Ju*

Toy, 198 U.S. 253; *Chin Yow v. United States,* 208 U.S. 8, and *Tang Tun v. Edsell,* 223 U.S. 673.

The two claimants in this case were admittedly *excluded* and are to be deported in accordance with the final order. Deportation is involved in both exclusion and expulsion cases. Appellant's statement on page 7 of his brief that the "two young men were admitted to the United States under bond. In such event regardless of the method of entry, upon habeas corpus, the matter must be treated as a deportation matter, giving the right to a full hearing in the United States District Court," indicates that appellant is mistaken in his understanding of the status of the "two young men." They were not admitted to the United States—they were paroled on bond. Within the meaning of the law they are excluded at the limit of the jurisdiction awaiting order of the authorities.

Nishimura Ekiu v. U.S., 142 U.S. 651;
United States v. Ju Toy, 198 U.S. 253;
Kaplan v. Tod, 267 U.S. 228;
Shaughnessy v. Mezei, 345 U.S. 206;
Jew Sing v. Barber, (CA-9), 215 F. 2d 906;
United States v. Spar, (CA-2), 149 F. 2d 881.

Appellant's position on this question is nothing more than a suggestion that Congress shouldn't have changed the law. *Quon Quon Poy v. Johnson* (supra) is accepted as controlling.

(2) THE CLAIMANTS WERE GIVEN A FAIR HEARING AND THE ACTION OF THE BOARD OF SPECIAL INQUIRY AND THE BOARD OF IMMIGRATION APPEALS WAS LAWFUL AND IN THE PROPER EXERCISE OF DISCRETION.

The only real contention of appellant in this appeal is that the Board was arbitrary and capricious in deciding against appellant.

In paragraph V of his complaint (Tr. 5) appellant alleged that the proceedings before the Board of Special Inquiry were "sham"; that "evidence was excluded from said hearing dealing both with blood and paternity tests which would have established that petitioner is the father . . ."

The court below permitted appellant to introduce such evidence into the record. Petitioner's Exhibit No. 2 (Tr. p. 18). The blood tests show that Jow Chu Yun could not be the father of Jow Kwong Yeong. (Tr. p. 20.) But as to Jow Mun Yow "it is not possible to exclude him as the son" (Tr. p. 20), on the tests alone.

The immigration record was introduced into evidence as Exhibit No. 1 (Tr. p. 17.) Counsel for appellant stated to the Court—"We have a record here before your Honor which under the McCarran Act, your Honor is entitled to review on habeas corpus." (Tr. pp. 22-23.) "I think that your Honor is obliged to read this record . . ." (Tr. p. 25.)

The Court below did review "all of the records and files of the administrative hearing, and after a full consideration of all the evidence . . ." ordered the writ vacated and the petition dismissed.

Appellant now asks this Court to review the entire record and to disagree with the Board of Special Inquiry, the Board of Immigration Appeals, and the judge of the District Court. This would be in effect a review of the review.

Appellee respectfully submits that the decision of the Immigration Board of Special Inquiry was not arbitrary or capricious and that the Court below has reviewed all the records and files of the Immigration Service in the manner contemplated by Section 360(c) of the McCarran Act, Public Law 414 (8 USC 1503(c)).

Dated, San Francisco, California,
February 4, 1955.

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